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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 252

SAMUEL CHAPMAN, PETITIONER

v.

THE UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 600-608) is reported in 168 F. 2d 997.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1948 (R. 608). Petition for rehearing was denied on August 4, 1948 (R. 629). Petition for a writ of certiorari was filed on August 31, 1948. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether there was a fatal variance between the indictment and the bill of particulars.
2. Whether the evidence was sufficient to sustain the conviction.
3. Whether the conduct of the prosecutor constituted prejudicial error.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

STATEMENT

Petitioner was charged in a one count indictment returned in the Northern District of Illinois

with having wilfully attempted to evade and defeat his income taxes for the calendar year 1943, by filing a false and fraudulent tax return for that year, in violation of Section 145 (b) of the Internal Revenue Code. The indictment alleged that instead of the net income of \$90,124.16 and tax liability of \$60,355.36 shown on the return, the petitioner's actual net income for the year 1943 was \$300,739.98 on which he owed a total tax of \$253,674.82 (R. 2-3). After trial by a jury, the petitioner was convicted and was sentenced to a period of imprisonment of one year and one day and was fined \$10,000 (R. 579-580).

Among the items of gross income shown in the indictment was one designated as "Other income", in the amount of \$282,115.82 (R. 2-3). The petitioner requested a bill of particulars stating in detail which particular items of income were included in this sum of \$282,115.82, by whom each such item was paid to the petitioner, and in what manner such payments were made, that is, whether by cash, check, goods, services, or other means (R. 8). The motion was allowed (R. 9), and in response to the order of the court, the Government filed a bill of particulars stating it was prepared to prove "that the defendant expended over reported income the amount alleged in the indictment", but that it did not possess the information necessary to specify in detail each item making up the total sum of \$282,115.82, or by whom such item was paid, or the character,

manner and amount of such payment (R. 10-11). The petitioner then moved to dismiss the indictment (R. 11-12). Prior to any ruling on the motion to dismiss, the Government, by leave of court (R. 19), filed an amendment to its original bill of particulars and also a supplemental bill of particulars (R. 19-20). The amendment stated that the petitioner had expended an amount "in excess of the total of his available declared resources", during the calendar year 1943. The supplemental bill of particulars stated that the source of the "other income" alleged in the indictment was "the illegal sale of meat and meat products at over-ceiling prices to various persons", and that the details of these transactions were matters peculiarly within the knowledge of the petitioner. The petitioner's motion to dismiss the indictment was then denied (R. 21).

The evidence adduced by the prosecution showed that the petitioner was the president and controlling stockholder of the Empire Packing Company, which was engaged in the processing and sale of meat (Govt. Ex. 13; R. 84-85).

During the year 1943, the petitioner increased his personal net worth by \$251,310.91 and made non-deductible expenditures for his personal use and benefit in the amount of \$51,303.99—the increase plus the expenditures totaling \$302,614.90 (R. 355-359). The "starting point" for the computation of the increase in net worth was January 1, 1942 (R. 358). The petitioner's assets, includ-

ing cash on hand (R. 351, 353), and his liabilities as of that date were determined from the petitioner's own books and records which had been submitted to the investigating agents for examination (R. 347, 348, 350). Those records, the accuracy of which the petitioner himself verified (R. 350), showed that his net worth on January 1, 1942, was \$246,668.39 (R. 358). His net worth as of January 1, 1943, was determined by adding the amount of net income he reported on his 1942 return (after certain adjustments) to his net worth as of January 1, 1942 (R. 393), the computation resulting in a net worth of \$282,227.66 for January 1, 1943 (R. 358). The petitioner's net worth as of December 31, 1943, was shown to be \$533,538.57 (R. 359).

The difference of \$251,311 between the net worth at the beginning and end of the year 1943 represented, in major part, the petitioner's investments in a farm which he acquired during that year. This farm was carried on petitioner's records at an original cost of \$55,000 (R. 355), but the actual purchase price was shown to be \$100,000 (R. 100), of which \$79,000 was paid in currency of small denominations (R. 100, 106-107). There was other evidence to show a pattern of concealment of income. The petitioner expended a total of \$283,464.99 in currency during the year 1943, at a time when he controlled several checking accounts (R. 356). He made expenditures totaling \$151,909.24 of which

there was no record on his books (R. 356). Three bank accounts, two of which were in the name of an agent, were not recorded on petitioner's books, the total deposits to these accounts during 1943 amounting to \$177,471.14 (R. 356-357). A nominee of the petitioner purchased cashiers' checks in the approximate amount of \$35,000, with currency furnished to the nominee by the petitioner (R. 184-185). Certain checks of the Empire Packing Company were made payable to a nominee and then endorsed to the petitioner (R. 142-143). The petitioner placed dummy mortgages of \$37,500 on his properties (R. 182), and falsified the amount of notes payable by him (R. 280-281, 357-358). Seven witnesses testified that during the year 1943 they paid over-ceiling prices for meat purchased from the Empire Packing Company, paying the excess in currency either to the petitioner directly or to one of two salesmen (R. 287-297, 300-305, 317-341). The salesmen testified that they turned over the excess payments to the petitioner (R. 276-283, 311-316), who directed one of them not to keep any records of such payments (R. 278).

On appeal, the judgment of conviction was affirmed by the Court of Appeals for the Seventh Circuit (R. 608).

ARGUMENT

1. The petitioner claims that the indictment should have been dismissed because there was a

fatal variance between it and the bill of particulars. This claim is predicated upon the contention that the bill of particulars, both in its original form and as amended and supplemented, disclosed on its face that the evidence to be introduced in support of the charges of the indictment was insufficient in law to prove the crime of attempted tax evasion. Since there is no claim that the nature of the evidence actually adduced upon trial differed from that which the amended and supplemental bills of particulars disclosed would be introduced, petitioner's contention on this score is, in essence, merely a variant of his argument that the evidence was not sufficient to prove the crime charged. The amended and supplemental bills of particulars apprised the petitioner that the unreported income charged to him would be proved by showing that he expended during the calendar year 1943 an amount in excess of the total of his declared available resources and that the source of this income was the illegal sale of meat and meat products at over-ceiling prices. The method of establishing additional income by showing that the private expenditures of a taxpayer during a certain period exceeded his available declared resources was expressly sanctioned by this Court in *United States v. Johnson*, 319 U. S. 503, 517. See also *United States v. Skidmore*, 123 F. 2d 604 (C. C. A. 7th), certiorari denied, 315 U. S. 800. There was thus no variance

between the indictment and the bills of particulars but rather the bills of particulars served to inform the petitioner of the nature of the evidence to be offered by the prosecution.

2. The petitioner bases his contention that the evidence was insufficient to sustain conviction upon two principal grounds: (a) There was no evidence, independent of the petitioner's extrajudicial admissions, to establish the petitioner's net worth at the time selected as a "starting point" for the net worth computation, and (b) the unreported income was not taxable to the petitioner under the rule of *Commissioner v. Wilcox*, 327 U. S. 404.

It is apparent from an examination of the record that the prosecution established petitioner's net worth by more than the required *quantum* of proof, and that it is "not a matter of tenuous speculation but of solid proof that there [was income] of a substantial amount which [Chapman] did not report." *United States v. Johnson*, 319 U. S. 503, 517. The "starting point" for the net worth computation was January 1, 1942. Evidence of the petitioner's assets and liabilities at that time was obtained from his own books and records, the accuracy of which he himself corroborated. These books and records constituted evidence independent of the petitioner's admissions, unless—and this would appear to be the position the petitioner now takes—the books and records themselves are to be con-

sidered extra-judicial admissions requiring corroboration. The case of *Warszower v. United States*, 312 U. S. 342, clearly reveals how tenuous is the position of petitioner in this respect. Warszower was convicted of the crime of using a United States passport which had been secured by a false statement. It was shown that on several occasions prior to the commission of the offense charged, Warszower had made statements inconsistent with those in his application for a passport. Upon appeal it was urged that the prior inconsistent statements were of no probative effect because they were uncorroborated. In rejecting this contention, this Court stated (p. 347):

The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist. Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the inherent weaknesses of confessions or admissions after the fact.

Consequently, even on the assumption that books and records kept in the regular course of business are of no higher evidentiary value than the admissions in question in the *Warszower* case, the admissions contained in the petitioner's books and records as to his financial status on January 1, 1942, did not need to be corroborated, since the

admissions were obviously made many months prior to the commission of the offense charged in the indictment.

The petitioner also challenges the validity of the net worth computation on the ground that his net worth as of January 1, 1943, was ascertained by adding the amount of net income reported on his 1942 amended tax return (after certain adjustments) to his net worth as of January 1, 1942. It is said, in effect, that this injects an element of uncertainty into the computation, as perhaps petitioner's income for 1942 was greater than the amount he disclosed on his return for that year, and that if this were so, his net worth at the beginning of the year 1943 would also be greater, and the increase in his net worth during the year 1943 less than the amount shown by the Government's evidence. Such argument is, of course, highly speculative, and if it is to be accorded any significance at all, necessarily involves an admission that income for 1942 was understated. Aside from this consideration, however, it should be pointed out that the amended 1942 return was filed in September, 1943 (R. 354), which was prior to the commission of the offense charged (R. 2), and thus, under the *Warszower* rule, is entitled to the same probative weight as any other such admission.

The petitioner further urges that the conviction cannot be sustained because the over-ceiling payments which he received did not constitute taxable

income to him in the light of the ruling in *Commissioner v. Wilcox*, 327 U. S. 404. This Court there held that embezzled funds were not taxable to an embezzler because (1) he received the money "without any semblance of a bona fide claim of right"; (2) he was "under an unqualified duty and obligation to repay the money"; and (3) the victim "at all times held the taxpayer liable to return the full amount". (Pp. 408, 409.) These criteria bar the application of the *Wilcox* rule here.

The petitioner was the president and controlling stockholder of the Empire Packing Company, and the only other stockholder was inactive in the business. Under these circumstances, the petitioner, at the time he received the over-ceiling payments, did not do so with intent to steal or embezzle; the more reasonable inference is that he regarded them, or at least a substantial part of them, as his own property. The first test prescribed by the *Wilcox* case, namely, the taking "without *any semblance* of a bona fide claim of right" (italics supplied), has therefore not been met. The second and third criteria of the *Wilcox* case afford even less support to petitioner's position. The petitioner was certainly under no "unqualified duty and obligation to repay the money." nor did the corporation, of which the petitioner was the *alter ego*, at all times hold the petitioner liable to return the full amount of the over-ceiling payments. The Empire Packing Company could

not have had a direct action against the petitioner to recover the diverted funds, for there were not enough stockholders in a position to authorize such action. Even theoretically, the only recovery would have been by way of a derivative stockholder action, and this would not impose the unconditional obligation required by the *Wilcox* decision.¹

As a practical matter, it is rather unreal to suppose that the corporation would assert, or have asserted for it, a claim to moneys which, if originally collected by the corporation, would have involved it in a violation of the Price Control laws. Even if such a claim were asserted, a court of equity would hardly entertain a derivative suit for moneys the collection of which would be illegal. Finally, the Court of Appeals for the First Circuit has held the *Wilcox* decision inapposite in a case very similar to the present one. *Currier v. United States*, 166 F. 2d 346.

3. The alleged prejudicial conduct of the prosecutor is claimed to have arisen out of the introduction of evidence relating to the petitioner's black market transactions and the references to those activities during the course of the argument to the jury. The evidence of black market transactions was introduced to show the source of peti-

¹ Cf. *National City Bank of New York v. Helvering*, 98 F. 2d 93 (C. C. A. 2nd), the effect of which has apparently been left unimpaired by *Commissioner v. Wilcox*, 327 U. S. at 409, fn. 7.

tioner's unreported income (R. 281). The prosecutor, in his argument, explicitly stated to the jury that such was the purpose of the evidence (R. 511-512). The court, in its charge, admonished the jury not to permit the kind of business in which the petitioner was engaged to prejudice them against him, and instructed them that the commission of an "offense against the laws of the United States other than that charged in the indictment creates no presumption that such defendant committed the offense here charged against him" (R. 555).

An examination of the record discloses that all of the remarks complained of were inferences logically drawn from the evidence in the case. The prosecutor may allude to the fact that the accused has committed crimes other than those for which he is on trial, where evidence supporting the particular reference is properly before the jury and the comment is a deduction from that evidence relevant to a material issue in the case. Likewise, he may refer to, and draw unfavorable inferences from, the conduct of the accused shown by evidence properly in the case, when those inferences are relevant to an issue material to the case. In making such comment, the prosecutor may characterize the accused or his conduct in language which, although it consists of invective or opprobrious terms, accords with the evidence in the case. *Baker v. United States*, 115 F. 2d 533 (C. C. A. 8th), certiorari denied, 312 U. S.

692; *Malone v. United States*, 94 F. 2d 281 (C. C. A. 7th), certiorari denied, 304 U. S. 562; *United States v. Wealer*, 79 F. 2d 526 (C. C. A. 2d), certiorari denied, 297 U. S. 703.

The motion filed by the petitioner, prior to trial, to exclude evidence relating to black market activities was only a conditional one, premised on what the courts below have held to be petitioner's erroneous contention as to the nature of proof necessary for a conviction (R. 44-45).

No objection was made during the course of the argument to any of the remarks now claimed to be prejudicial (R. 506-518, 542-546).

CONCLUSION

The decision below is in all respects correct. No important question of law or conflict of decisions is presented. It is therefore respectfully submitted that the petition should be denied.

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OCTOBER 1948.